

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

JORGE PEREZ-SERRANO,)	CV F 04-6617 AWI
)	(CR F 02-5190 AWI)
Petitioner,)	
)	ORDER DENYING
v.)	CERTIFICATE OF
)	APPEALABILITY
UNITED STATES OF AMERICA,)	
)	(28 U.S.C. § 2255)
Respondent.)	

On September 12, 2007, the court issued an order (the “September 12 Order”) denying petitioner Jorge Perez-Serrano’s (“Petitioner’s”) motion for habeas relief pursuant to 28 U.S.C. section 2255 (the “habeas Petition”). On September 19, 2007, Petitioner filed a document titled “Defendant’s Notice of Appeal Pursuant to 18 U.S.C., § 3742 (hereinafter the “Notice”). Petitioner’s Notice is somewhat ambiguous in that the Notice is filed under both Petitioner’s criminal case number and the habeas case number, which would be normal if it was Petitioner’s intent to appeal this court’s denial of Petitioner’s habeas Petition, however Petitioner’s Notice does not mention the court’s denial of the habeas Petition and appears to be instead a direct appeal of the judgment pursuant to 18 U.S.C., section 3742.

The court also notes that Petitioner’s Notice indicates that the issues Petitioner seeks to appeal appear to be the same issues that Petitioner attempted to raise by way of amendment

1 to his habeas Petition. Petitioner's motion to amend was denied by the order of the court on
2 June 26, 2007. Doc. # 106. The court found that the amendment was time-barred, and that
3 even if the amendment had not been time-barred the issues raised by the motion to amend
4 were not factually supported.

5 Thus, it is unclear whether it was actually Petitioner's intent to directly appeal his
6 judgment and conviction or whether Petitioner intends to appeal this court's denial of either
7 his motion to amend his habeas Petition and/or to appeal the court's denial of the Petition
8 itself. Because an appeal of the denial of a habeas petition requires the court to issue a
9 certificate of appeal, the court will address Petitioner's Notice under the presumption that it is
10 Petitioner's intent to appeal Petitioner's motion to amend his Petition or to appeal the denial
11 of Petitioner's habeas Petition.

12 Although no express request was made for a certificate of appealability, the notice of
13 appeal shall be deemed to constitute a request for a certificate. See United States v. Asrar,
14 108 F.3d 217, 218 (9th Cir. 1997); Fed. R.App. P. 22(b). The controlling statute, 28 U.S.C.
15 § 2253, provides as follows:

16 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district
17 judge, the final order shall be subject to review, on appeal, by the court of appeals for
the circuit in which the proceeding is held.

18 (b) There shall be no right of appeal from a final order in a proceeding to test the
19 validity of a warrant to remove to another district or place for commitment or trial a
20 person charged with a criminal offense against the United States, or to test the validity
of such person's detention pending removal proceedings.

21 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal
may not be taken to the court of appeals from--

22 (A) the final order in a habeas corpus proceeding in which the detention
complained of arises out of process issued by a State court; or

23 (B) the final order in a proceeding under section 2255.

24 (2) A certificate of appealability may issue under paragraph (1) only if the applicant
has made a substantial showing of the denial of a constitutional right.

25 (3) The certificate of appealability under paragraph (1) shall indicate which specific
26 issue or issues satisfy the showing required by paragraph (2).

27 The Supreme Court has found that the Court should issue a certificate of appealability

1 when the petitioner shows that jurists of reason would find it debatable whether the petition
2 states a valid claim of the denial of a constitutional right and that jurists of reason would find
3 it debatable whether the district court was correct in its procedural ruling. Slack v.
4 McDaniel, 120 S.Ct. 1595, 1603 (2000). The requirement that the petitioner seek a certificate
5 of appealability is a gate-keeping mechanism that protects the Court of Appeals from having
6 to devote resources to frivolous issues while at the same time affording petitioners an
7 opportunity to persuade the Court that through full briefing and argument the potential merit
8 of claims may appear. Lambright v. Stewart, Nos. 96-99020, 96-99025, 96-99026, 2000 WL
9 1118937 (9th Cir. Aug. 4, 2000). The Supreme Court has found that the even the application
10 of an apparently controlling Ninth Circuit rule can be debatable if it conflicts with the rules of
11 another circuit or there is reasonable argument of why the Ninth Circuit should reconsider
12 the Ninth circuit rule. See id.

13 In the present case, the court finds that petitioner has not made the required
14 substantial showing of the denial of a constitutional right to justify the issuance of a
15 certificate of appealability. Reasonable jurists would not debate that petitioner has not
16 shown how he is entitled to federal habeas corpus relief. To the extent Petitioner is seeking
17 to appeal the court's denial of his motion to amend his habeas Petition, the court's denial
18 could not be found debatable by reasonable jurists because any further amendment of the
19 habeas Petition was and is time-barred. Accordingly, the Court hereby ORDERS that
20 petitioner's request for a certificate of appealability is DENIED both as to the court's denial
21 of Petitioner's motion to amend and as to the court's denial of Petitioner's habeas Petition.
22

23 IT IS SO ORDERED.

24 **Dated: October 5, 2007**

/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE